

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

(Watsonville, CA)

COMMUNIDAD ORGANIZADA  
PARA LA EDUCACION (COPE)

Employer-Petitioner

and

Case 32-UC-406

SERVICE EMPLOYEES  
INTERNATIONAL UNION  
LOCAL 415, AFL-CIO

Union

**DECISION AND ORDER**

Comunidad Organizada Para La Educacion (COPE), herein called the Employer, is engaged in the operation of childcare and preschool facilities at three facilities in Watsonville, California. Service Employees International Union, Local 415, AFL-CIO, herein called the Union, was certified on July 22, 2003, to represent a collective bargaining unit of the Employer's teachers, teachers aids and assistants, program secretaries, cooks, maintenance employees and site supervisors.<sup>1</sup> The Employer filed a petition with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act seeking to have the

---

<sup>1</sup> As described below, the site supervisor position was inadvertently included in the bargaining unit in both the Decision and Direction of Election and the Certification of Representative. Neither party addressed the inclusion of the site supervisor until the filing of the petition in this case on November 30, 2004. On February 10, 2005, a Correction to Decision and Direction of Election and Certification of Representative issued reflecting the correct bargaining unit. After the issuance of the Correction, the Petitioner (Employer) declined the opportunity to withdraw the petition in this case, noted the parties' inability to resolve the site supervisory issue through bargaining, and requested that the Region issue the unit clarification decision regarding whether the site supervisors should be included in the unit.

bargaining unit clarified to exclude site supervisors on the basis that they are supervisors within the meaning of the Act. A hearing officer of the Board held a hearing in this matter.<sup>2</sup>

At the hearing, the evidence established that the Employer employed a site supervisor at its COPE facility' and that the person who was recently hired to be the site supervisor at the Employer's two other facilities had not yet begun work as the site supervisor. After the presentation of the evidence at the hearing, the parties continued to disagree regarding whether the site supervisor classification should be included in the unit. As discussed below, I have concluded that the unit should be clarified to include the site supervisor at the Employer's COPE facility. Because the person hired to be the site supervisor for the other two facilities had not even begun working in that position at the time of the trial in this case, and the record does not have evidence regarding that person's authority, I cannot make a determination as to whether that person will be a statutory supervisor. In these circumstances, I will not clarify the unit to also include this position. To provide a context for my discussion of the issue, I will first briefly describe the origins and evolution of the existing bargaining unit and then will give an overview of the Employer's operations. Finally, I will present the facts and reasoning that supports my conclusions in this matter.

## **THE FACTS**

### **The Bargaining Unit**

The Union filed a petition in Case 32-RC-5156 seeking to represent a unit of "All full time and regular part-time employees, including teachers, associate teachers, teacher assistants, teacher aides, site supervisors, program secretaries, cooks, and maintenance employees." A pre-election hearing was held concerning certain disputed classifications, including site supervisors. Because the record evidence was insufficient to establish whether the site supervisors were

---

<sup>2</sup> Only the Union filed a post-hearing brief.

supervisors within the meaning of Section 2(11) of the Act, I allowed them to vote subject to challenge on their supervisory status. Those challenged ballots were not determinative of the results of the election. The certification, which issued July 22, 2003, contained the following unit description:

All full time and regular part-time employees, including teachers, associate teachers, teacher assistants, teacher aides, site supervisors, program secretaries, cooks, and maintenance employees, employed by the Employer at its Watsonville, California facilities; excluding the Executive Director; Chief Financial Officer; accounting staff; Grants Manager; Program Director; Human Resources Coordinator/ED Assistant, guards, and supervisors as defined in the Act.

Since that time, the parties have entered into negotiations for an initial collective bargaining agreement but have been unable to resolve the issue of the supervisory status of the site supervisor position.

#### The Employer's Operations

The Employer is engaged in the operation of three private childcare and/or pre-school facilities in Watsonville, California: the Louise Blanchard Center (LBC); the Starlight State Pre-School Program (Starlight); and the Comunidad Organizada Para La Educacion (COPE). A Board of Directors oversees the entire operation. Directly under the Board of Directors is the Executive Director, Guadalupe Mendoza. The Executive Director formulates the Employer's labor relations policies, subject to the approval of the Board of Directors. Under Executive Director Mendoza in the Employer's hierarchy are Chief Financial Officer Carlos Garcia; Program Director Raquel Leon; and Human Resources Assistant/accounting clerk Angelica Fernandez.

The Starlight and LBC programs are located at the same facility. COPE is located in a different facility, which is located approximately 5 to 7 miles from the Starlight/LBC location. There are two separate pre-school programs at Starlight, one program at LCB and one at COPE.

There is one teacher and from four to eight associate teachers for each program, depending on the number of children. There is one cook at each facility and an assistant cook at the Starlight facility. Executive Director Mendoza, CFO Garcia and the accounting staff have offices at COPE. Program Director Leon's office is located at LBC.

#### Site Supervisor Position

State and federal regulations require a site supervisor at each facility. At the time of the pre-election hearing in June of 2003, there were three site supervisors, including Amy Rather, who has been the site supervisor at the COPE facility since 2000. At some point thereafter, the other two site supervisors left their positions and one person, Jorge Fernandez, was hired as the site supervisor for both LBC and Starlight. Fernandez worked as the site supervisor from about May to November 2004. Since November 2004, the site supervisor positions at both LBC and Starlight have been vacant, and Program Director Leon has been serving as the site supervisor at LBC and Starlight with the assistance of two head teachers at Starlight.. The Employer has recently hired an individual to fill the position at LBC, but that person's starting date was not known at the time of the hearing. It appears that this individual may have been hired as the site supervisor for both LBC and Starlight. However, there is no record evidence concerning what, if anything, the Employer told this individual regarding her authority. There is also no evidence as to what authority the Employer expects to give to the person in this site supervisor position.

Site supervisors are required to have a teaching credential with 12 units of early childhood education and 3 units of supervised field experience in an early childhood education setting. A teacher must have only an associates degree in early childhood education or 24 units of early childhood education and 16 general education units.

Rather testified that, as a site supervisor, she spends most of her time on regular teaching duties in the classroom and, as such, has the same responsibilities as do other teachers. The evidence adduced at the hearing shows the following regarding Rather's additional authority and duties:

Promotions, Firing and Hiring: The parties stipulated that the site supervisor has no authority to promote or terminate employees. With regard to hiring, the Employer typically uses a panel of three individuals to interview applicants for all positions. Site Supervisor Rather has served on several of these panels along with the program director and human resources assistant. At various times, bargaining unit teachers have also served on these panels. The interviewers take turns asking the applicants questions that have been scripted by someone in human resources. Each interviewer assigns a numerical rating to the applicant's answer. Once the interview is over, the panel members discuss the applicants. Recently, Rather was one of the interviewers for the LBC site supervisor position, along with program director Leon and human resources assistant Fernandez. Rather testified that she did not know who made the final decision as to which of the two applicants should be hired. According to Leon, the decision was made among the three interviewers, and she and Rather felt more strongly about the successful applicant than did Fernandez. However, Leon was unsure who actually made the job offer to the applicant, and the evidence does not establish what weight, if any, was given to Rather's numerical rating or comments about the applicant.<sup>3</sup>

Evaluations: The Employer has a policy of evaluating teachers on an annual basis. Each teacher writes a self-evaluation. Rather testified that she then meets with each teacher individually to

---

<sup>3</sup> There is also some evidence that Rather had informed her superiors that they should hire a cook for the COPE facility and that the cook should have some early childhood course credits so that she could help in the classroom if needed. According to Rather, she was primarily serving as a conduit with regard to the preferences of the COPE

discuss the self-evaluation and the teacher's strengths and weaknesses. Rather then prepares a summary, which basically sets forth the same points the teacher had made in the self-evaluation. Rather does not add any of her own comments. Once Rather completes her summary, she forwards the evaluation to human resources. Program Director Leon testified that she has not reviewed any evaluations for employees at COPE, and the record shows that the evaluation process has no bearing on an employee's potential for promotions, raises or any other type of reward. Pay increases depend solely on completion of early childhood education credits.

Discipline: There is no record evidence that Rather has ever issued any oral or written discipline to any employee. On one occasion, Human Resources Assistant Fernandez told Rather that there was a problem with one of the teachers not filling out her time sheet and that the employee would not be paid if it occurred again. Rather then relayed this information to the employee and the problem was corrected.<sup>4</sup>

Time Keeping, Time off, Scheduling: The teachers and teaching assistants at COPE work set schedules and have kept the same hours for many years. Any changes in employees' schedules have been at their own request. The employees maintain their own bi-weekly time sheets, recording their arrival and departure times and any vacation or sick time. Rather signs each employee's time sheet before it is forward to human resources. According to Program Director Leon, Rather's signature on the time sheets indicates she is aware of the hours that the employee has worked.

---

staff. The Employer did hire a cook with early childhood class credits; however, Rather was not part of the hiring panel that interviewed that applicant.

<sup>4</sup> There was some limited testimony showing that the former site supervisor at LBC had issued an oral warning to an employee at a staff meeting for an inappropriate outburst, which apparently stemmed from negative comments the site supervisor had made on the employee's annual evaluation. As noted above, the record is silent as to the extent of authority the new site supervisor will have.

The Employer presented some conclusionary evidence indicating that Rather was responsible for preparing the employee schedules; however, the evidence also shows that the COPE facility schedule has not been changed for many years.<sup>5</sup> Rather is involved in the scheduling of substitutes. The determination of when to get a substitute is determined by the State of California rules, which mandate a certain ratio of teachers to students. As a result, whenever a teacher's absence brings the facility below the mandated teacher student ratio, a substitute must be found in order to maintain the proper staffing levels. On most occasions, Rather is responsible for arranging a substitute for an absent employee, and she essentially has two options. First, she may ask an off duty COPE facility teacher if he/she can fill in for the missing teacher. If necessary, Rather may authorize an employee to work overtime to maintain the mandated ratio. Rather testified that in the last six months she has authorized one hour of overtime and that was due to the need to maintain the mandated ratio. There is no record evidence about what, if any, judgment she used in deciding who would work the overtime. There is no evidence that Rather has ever required that a particular employee work overtime. Second Rather may secure a substitute by contacting individuals who are on a qualified substitute list that was given to her for that purpose. Rather has no responsibilities with regard to who is on the list or in making sure that the employees on the list have the proper qualifications. Rather selects employees from that list based on the employees' respective amount of prior experience at the COPE facility. There is no evidence of any instances when Rather has not been able to arrange coverage for an absent employee, either by calling in a substitute or asking other

---

<sup>5</sup> There is also evidence showing that the schedules must be changed in the future, because the schedules do not include some state mandated break periods. Rather, who was opposed to changing the schedule, will apparently be involved in making the new schedule. It is not clear that Rather will be called on to exercise significant discretion in adding the break periods for those employees who are to receive breaks.

employees to volunteer.<sup>6</sup> There is also no evidence of Rather ever ordering an employee to act as a substitute. Finally, I note that the record also shows that, at times, teachers arrange their own substitutes among themselves and then notify Rather of the arrangement, so that it can be recorded on the master calendar.<sup>7</sup>

The evidence also shows that Rather has also not sent any regular teachers home when the COPE facility was over the ratio, unless the administration has told her to do so.<sup>8</sup> It is not clear what the Employer's policy is in this regard. Program Director Leon testified that when overstaffed, she would like to see a teacher go home to save the Employer money, but Leon conceded that that does not happen. Rather testified that she has assigned employees to perform other tasks rather than have them leave and not be paid when they are over the ratio. She has also informed her superiors of these actions. There is no evidence as to how often this has occurred, how many teachers have been involved, or how Rather decides what assignments to make and whether she uses any independent judgment in doing so. There is also insufficient evidence to determine whether Rather had been acting consistent with the Employer's established practice or whether her actions were based on the exercise of her own discretion.<sup>9</sup>

The Employer does require employees to complete time off requests for planned vacations and other absences. Although Rather signs these requests, Program Director Leon testified that she must see them beforehand to make sure they are completed accurately and that

---

<sup>6</sup> The Employer has a lenient policy of allowing employees time off from work due to their own or family sickness or emergencies. There is evidence of only one occasion when an employee was denied time off, and the decision to deny the request was not made by Rather. On that occasion, the employee gave Program Director Leon only 30 minutes notice of a doctor appointment and substitute coverage could not be arranged.

<sup>7</sup> All absences are noted, usually by the employee, in a communications log that is kept at each facility.

<sup>8</sup> According to Rather, both she and other teachers have sent substitutes home when it was determined that the COPE facility was over the mandated ratios.

<sup>9</sup> There is also evidence that Rather decided to perform some janitorial work while the maintenance employee was on vacation. Rather states that she could not assign anyone else to perform the work, she was the employee who was responsible for closing the facility, and the janitorial work needed to be done. There is little detail regarding these events and it is not even clear whether Rather was paid for performing this work



there is adequate substitute coverage. One of the COPE teachers submitted a time off request for three days of sick leave. Rather signed the request and forwarded it to human resources, which would not approve the request without a doctor's note, an Employer requirement for absences of three days or more. Rather then communicated this to the employee who changed her request so that she would be paid for the time.

Wages and Benefits: As noted, wage scales and pay increases for teachers and assistants are determined by the educational level and certifications or permits that a teacher possesses or earns.<sup>10</sup> There is no evidence that the teachers' evaluations have affected their wages or promotion potential. As site supervisor, Rather earns approximately \$1.00 more per hour than the next highest paid teacher. There is no evidence of any difference in benefits.

Meetings: The Employer conducts management meetings on a monthly basis, and, historically, the site supervisors, along with the executive director, financial officer, human resources assistant and program director, are required to attend. Various topics are discussed at these meetings, including funding, financial reports, work schedules, staff issues, staffing levels, licensing, hiring and meal preparation. Rather may raise any issues regarding her facility and, on occasion, she prepares written reports detailing events involving the children in her program. After each meeting, Rather informs the rest of the staff at the COPE facility about what occurred at the meeting.

Grievance Adjustment: Rather testified that, on occasion, teachers bring their problems to her, including their problems with other teachers. According to Rather, she played the role of a facilitator between the employees who were in conflict, and she never imposed her decision on the conflicted employees. Rather has never taken any of these problems to a higher level. There

---

<sup>10</sup> There is no evidence that Rather plays a role in pay increases for the unit employees who are not teachers.

are no examples as what these problems may have entailed, nor are there any details regarding what role, if any, Rather may have had in solving the problems.

## **ANALYSIS**

### **The Applicable Law**

Section 2(11) of the Act defines a supervisor as one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” The possession of any one of these primary indicia of supervisory authority, as specified in Section 2(11) of the Act, regardless of the frequency of their use, is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner that is more than routine or clerical. Harborside Healthcare, Inc., 330 NLRB 1334 (2000); Hydro Conduit Corp., 254 NLRB 433, 437 (1981); Queen Mary, 317 NLRB 1303 (1995).

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861 (2001); Bennett Industries, Inc., 313 NLRB 1363 (1994); Tucson Gas and Electric Co., 241 NLRB 181 (1979). To meet this burden the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor’s decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. Designation of an individual as a supervisor by title in a job description or other documents is

insufficient in and of itself to confer supervisory status. Western Union Telegraph Company, 242 NLRB 825 (1979). On the other hand, possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip op. at 3 n.10 (2003); Pepsi Cola Co., 327 NLRB 1062, 1063 (1999); Fred Meyer Alaska, Inc., 334 NLRB 646, 648 n. 8 (2001). It is the possession of a power, rather than its actual exercise, that is determinative of supervisory status. See Formco, Inc., 245 NLRB 127, 128 n.7 (1979); Redlands Christian Migrant Assn., 250 NLRB 134, 138 (1980).

In this case, it is the Employer who is asserting that the site supervisors are supervisors, and therefore it has the burden of establishing the supervisory status of these positions. For the reasons set forth below, I find that the Employer has not satisfied its burden in this regard.

Site supervisor Rather has no authority to promote or terminate employees. Although she has occasionally participated in interviewing applicants, she is only one of three members of an interview committee, and the evidence does not establish what weight has been given to Rather's view of the applicants. Moreover, bargaining unit teachers also regularly serve on such committees in the same capacity as Rather. Rather testified without contradiction that she has never disciplined an employee and that she never adds any of her own comments on self-evaluations completed by the teachers. Furthermore, these evaluations have no bearing on an a teacher's potential for promotions or raises since that is dependent solely on completion of college level credits.

With regard to substitutions, Rather's role is somewhat limited. First, on some occasions employees have arranged substitutions among themselves and then merely notified Rather of this arrangement. Second, when Rather must secure a substitute, she either asks for volunteers from

among the unit employees, or calls pre-qualified substitutes from a list provided to her by the Employer.<sup>11</sup> Thus, the evidence does not establish that in carrying out her duty to secure substitutes she exercises the kind of discretion that establishes supervisory authority.

The evidence also shows that employee schedules rarely change and that Rather has never changed an employee's work schedule. Rather does sign time sheets but only as an indication that she is aware of the hours worked by each employee. Similarly, Rather signs time off requests but Program Director Leon must first independently verify that there is adequate coverage before she approves the time off. Rather also testified without contradiction that she has approved one hour of overtime in the past six months. On that occasion, the overtime was necessary because, as mentioned above, Rather is required to maintain certain staff student ratios. There is no evidence that she used significant independent judgment in asking the employee to work overtime.<sup>12</sup>

The record does not show that Rather decides what type of work employees will do at the facility. However, with regard to situations where there are more teachers scheduled than are required to meet the mandated ratios, there is some conclusionary evidence that Rather has given the excess teachers other work to perform. The assignment of tasks in accordance with an employer's set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. Express Messenger Systems, 301 NLRB 651, 654 (1991); Bay Area-Los Angeles Express, 275 NLRB 1063, 1075 (1985). The Board and federal courts typically consider assignment based on

---

<sup>11</sup> There have been no instances when Rather has either denied time off or advised an employee that a substitute could not be found.

<sup>12</sup> As noted above, the evidence shows that Rather does not send regular employees home when the Employer is overstaffed according to the staffing ratios. The evidence does not establish that Rather has any discretion in this situation. Program Director Leon testified that in those circumstances, she would like to see a teacher go home to save the Employer money, but Leon conceded that that does not happen. Leon did not indicate that only Rather fails to send employees home on occasions where the ratios would allow a lesser number of teachers.

assessment of a worker's skills to require independent judgment and therefore to be supervisory, except where the "matching of skills to requirements [is] essentially routine." Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001). Here, it is unclear how often Rather has made such work assignments and there is insufficient evidence to establish that the assignment of this work required the exercise of independent judgment.

Secondary indicia of supervisory authority may be relied on only in otherwise close cases where some evidence indicates the existence of primary indicia. See GRB Entertainment, 331 NLRB 320 (2000); Billows Electric Supply, 311 NLRB 878 fn. 2 (1993). Here I find that the secondary indicia do not establish that Rather is a Section 2(1) supervisor. As site supervisor Rather earns only \$1.00 more per hour than the next highest paid teacher and receives no different benefits. Although the site supervisor is required to have slightly more education credits than a teacher, no advanced degrees or permits are required. Rather does attend management team meetings, but it appears that she is acting primarily in the role of a conduit relaying information to and from the rest of the staff at her facility. I also note that both the executive director and chief financial officer have offices at the COPE facility where Rather works as the site supervisor; thus, Rather is not the highest-ranking person at this facility. Furthermore, in addition to the executive director, the chief financial officer and Rather, the COPE facility has only six other employees: one teacher, four associate teachers, one teacher's aide and one cook. Thus, finding Rather not to be a statutory supervisor does not create a suspiciously high ratio of employees to supervisors at this facility.

Based on the facts in this case, I cannot conclude that Amy Rather, in carrying out her duties as the site supervisor at the COPE facility, exercises the degree of independent discretion necessary to establish that she is a supervisor within the meaning of Section 2(11) of the Act.

Therefore, I shall clarify the unit to include the COPE site supervisor, only. Because the individual who was hired as the site supervisor for the Employer's other two facilities had not begun working in that position at the time of the hearing in this case, and the record is unclear as to what authority that person may have as the site supervisor, I cannot make a determination as to whether or not that person will be a Section 2(11) supervisor. Therefore, I will not clarify the unit to also include this position.

### **CONCLUSIONS AND FINDINGS**

1. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is a California non-profit corporation with facilities located at 2667 East Lake Avenue and 175 Laurence Avenue, Watsonville, California, where it is engaged in the operation of childcare and preschool facilities. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Employer seeks to clarify the existing bargaining unit to exclude the position of site supervisor from the unit, and the Union seeks to include the position of site supervisor in the bargaining unit.

5. I find that the site supervisor position at the Employer's COPE facility shall be included in the unit.

## **ORDER**

The unit is clarified to include the classification of site supervisor at the Employer's COPE facility.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on March 22, 2005. The request may **not** be filed by facsimile.

DATED AT Oakland, California, this 8th day of March, 2005.

---

Alan B. Reichard  
Regional Director  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, California 94612-5211

32-1302

177-8560-1500  
177-8560-4000